

**OCCUPATIONAL SAFETY  
AND HEALTH STANDARDS BOARD**

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Attachment No. 2

**INITIAL STATEMENT OF REASONS****CALIFORNIA CODE OF REGULATIONS**

**TITLE 8: Chapter 4, Subchapter 7, Article 109, Section 5189  
Of the General Industry Safety Orders**

**Process Safety Management of Acutely Hazardous Materials****SUMMARY**

On May 19, 2003, the Board received a CalOSHA Form 9 from the Division of Occupational Safety and Health (Division) requesting the Board to amend the Process Safety Management of Acutely Hazardous Materials (PSM) standard to add a definition for retail facility. This rulemaking was initiated in response to that request.

The PSM standard contains requirements for preventing or minimizing the consequences of catastrophic releases of toxic, reactive, flammable or explosive chemicals. The standard is intended to eliminate to a substantial degree, the risks to which employees are exposed in petroleum refineries, chemical plants, and other facilities. The state standard is substantially the same as its federal counterpart, 29 CFR 1910.119, Process Safety Management of Highly Hazardous Materials.

The PSM standard applies to a process which involves a chemical at or above the specified threshold quantities listed in appendix A or a process which involves a flammable liquid or gas as defined in subsection (c). The standard provides an exception which exempts retail facilities, oil or gas well drilling or servicing operations, and normally unoccupied remote facilities from application of the standard. The standard provides a definition for "normally unoccupied remote facility" but it does not define "retail facility".

The proposed revision adds a definition for retail facility that is derived from the definition of retail trade contained in the 2002 edition of the U.S. North American Industrial Classification System (NAICS) Manual. It is necessary to define retail facility in the standard because a number of facilities that handle more than 10,000 pounds of anhydrous ammonia, the threshold quantity that triggers application of the PSM standard, assert that because they sell to end users, i.e. farms, they are retail facilities and are not required to comply with the standard; although the NAICS Manual indicates that these facilities are engaged in wholesale trade. Worst-case predictions for a catastrophic release of 10,000 pounds of anhydrous ammonia estimate a concentration of 200 ppm of ammonia gas approximately one mile from the release. The exposure to employees working much closer to the release would be far greater. The National

Institute for Occupational Safety and Health (NIOSH) recommends a guideline of 300 ppm as the Immediately Dangerous to Life and Health (IDLH) concentration for ammonia.

In a recent California Occupational Safety and Health Appeals Board case the employer asserted that they believed their facility, which supplied anhydrous ammonia to farmers, was a retail facility and therefore exempt from the standard. The Administrative Law Judge in this case referred to the definition of retail trade contained in the Standard Industrial Classification Manual and concluded that the facility did not sell merchandise to the general public for personal or household consumption and thus was not a retail facility and was not exempt from the PSM standard. The proposed definition would help to distinguish retail facilities, which are organized to sell merchandise in small quantities directly to the general public, from wholesale facilities that supply institutional and industrial clients and are generally organized to handle products in larger containers that expose employees to a greater risk of injury from chemical releases which the PSM standard is intended to prevent.

### SPECIFIC PURPOSE AND FACTUAL BASIS OF PROPOSED ACTION

#### Section 5189. Process Safety Management of Acutely Hazardous Materials.

##### Section 5189(c). Definitions.

Section (c) contains definitions for many of the terms used in the standard; however it contains no definition for retail facility. The proposed amendment adds a definition for retail facility that is derived from the definition of retail trade contained in the 2002 NAICS Manual. The definition would help to distinguish retail trade from wholesale trade. Federal and State OSHA standards rely on the NAICS Manual or its predecessor, the Standard Industrial Classification (SIC) Manual, as the source of SIC codes that are incorporated into employer requirements pertaining to injury and illness recordkeeping standards and used in compliance directives regarding the PSM standard. The definition of retail facility has bearing on the application of the standard since the exception contained in section (b)(1) exempts retail facilities from the requirements of the standard. The proposed revision is necessary to provide guidance to employers to help them determine whether a facility is a retail facility to ensure that the exemption for retail facilities is appropriately applied to establishments in the retail trade sector where chemicals are often in small volume packages, containers and allotments making a large release unlikely.

In regards to comments from several industries that requested certain processes be exempt from the standard, (e.g. ammonia refrigeration, bulk liquid terminals, and chlorination facilities), federal OSHA states on pages 6369-6370 of the preamble to the federal standard published in Federal Register, Volume 57, No. 36, February 24, 1991, that it concurs with the Chemical Manufacturers Association's observation that the key question should be whether the highly hazardous chemical is present at or above the threshold quantity. Federal OSHA further states it believes that chemicals in retail facilities are in small volume packages, containers and allotments making a large release unlikely.

According to the Division's PSM Unit in southern California, establishments that sell anhydrous ammonia fertilizer to farms are the employers that most often incorrectly claim to be exempt from the PSM standard as a retail facility. It is not unusual for the maximum capacity of an anhydrous ammonia storage tank at these distribution facilities to be 40,000 to 50,000 gallons or 200,000 to 250,000 pounds of anhydrous ammonia. The threshold quantity for anhydrous ammonia under the PSM standard is 10,000 pounds. According to the NAICS Manual this type of establishment is engaged in wholesale trade rather than retail trade. Exempting this type of facility from the PSM standard as a retail facility is inconsistent with federal OSHA's statement that chemicals in retail facilities are in small volume packages, containers and allotments making a large release unlikely.

#### DOCUMENTS RELIED UPON

57 Federal Register, pages 6356 to 6372 (February 24, 1991). Final Rule 29 CFR 1910.119, Process Safety Management of Highly Hazardous Materials.

U.S. North American Industrial Classification System Manual, 2002 Edition, NAICS Association, available online at [www.naics.com](http://www.naics.com).

Summary of COSHAB-ALJ decision dated September 28, 2005, Docket Nos. 04-R3D7-631 to 633 (Brawley, CA), published in Cal-OSHA Reporter, October 21, 2005.

Standard Interpretations, 11/08/1995 – Applicability of 29 CFR 1910.119 Process Safety Management (PSM) Standard to the Manufacture of Explosives Required Under 29 CFR 1910.109(k)(2), U.S. Department of Labor, Occupational Safety and Health Administration.

*Preventing the Uncontrolled Release of Anhydrous Ammonia at Loading Stations*, U.S. Department of Labor, Occupational Safety and Health Administration, available online at [www.osha.gov/dts/shib/shib120505.html](http://www.osha.gov/dts/shib/shib120505.html).

These documents are available for review Monday through Friday from 8:00 a.m. to 4:30 p.m. at the Standards Board Office located at 2520 Venture Oaks Way, Suite 350, Sacramento, California.

#### REASONABLE ALTERNATIVES THAT WOULD LESSEN ADVERSE ECONOMIC IMPACT ON SMALL BUSINESSES

No reasonable alternatives were identified by the Board and no reasonable alternatives identified by the Board or otherwise brought to its attention would lessen the impact on small businesses.

#### SPECIFIC TECHNOLOGY OR EQUIPMENT

This proposal will not mandate the use of specific technologies or equipment.

#### COST ESTIMATES OF PROPOSED ACTION

#### Costs or Savings to State Agencies

No costs or savings to state agencies will result as a consequence of the proposed action.

#### Impact on Housing Costs

The Board has made an initial determination that this proposal will not significantly affect housing costs.

#### Impact on Businesses

The Board has made a determination that this proposal will not result in a significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. This proposal merely adds a definition for retail facility that is consistent with the general use of that term and the intent of the standard to clarify the scope and application of the standard regarding retail facilities. The proposal does not impose any additional requirements on employers.

#### Cost Impact on Private Persons or Businesses

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

#### Costs or Savings in Federal Funding to the State

The proposal will not result in costs or savings in federal funding to the state.

#### Costs or Savings to Local Agencies or School Districts Required to be Reimbursed

No costs to local agencies or school districts are required to be reimbursed. See explanation under “Determination of Mandate.”

#### Other Nondiscretionary Costs or Savings Imposed on Local Agencies

This proposal does not impose nondiscretionary costs or savings on local agencies.

### DETERMINATION OF MANDATE

The Occupational Safety and Health Standards Board has determined that the proposed standards do not impose a local mandate. Therefore, reimbursement by the state is not required pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code because the proposed amendment(s) will not require local agencies or school districts to incur additional costs in complying with the proposal. Furthermore this standard does not constitute a “new

program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.”

The California Supreme Court has established that a “program” within the meaning of Section 6 of Article XIII B of the California Constitution is one which carries out the governmental function of providing services to the public, or which, to implement a state policy, imposes unique requirements on local governments and does not apply generally to all residents and entities in the state. (County of Los Angeles v. State of California (1987) 43 Cal.3d 46.)

This proposed standard does not require local agencies to carry out the governmental function of providing services to the public. Rather, the standard requires local agencies to take certain steps to ensure the safety and health of their own employees only. Moreover, these proposed standards do not in any way require local agencies to administer the California Occupational Safety and Health program. (See City of Anaheim v. State of California (1987) 189 Cal.App.3d 1478.)

The proposed standard does not impose unique requirements on local governments. All employers - state, local and private - will be required to comply with the prescribed standard.

#### EFFECT ON SMALL BUSINESSES

The Board has determined that the proposed amendment may affect small businesses. However, no economic impact is anticipated.

#### ASSESSMENT

The adoption of the proposed amendment to this standard will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California.

#### ALTERNATIVES THAT WOULD AFFECT PRIVATE PERSONS

No reasonable alternatives have been identified by the Board or have otherwise been identified and brought to its attention that would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.